Civil Resolution Tribunal

Date Issued: January 27, 2022

File: SC-2021-002929

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Huang v. Dumonceaux*, 2022 BCCRT 105

B E T W E E N :

ZHONGJIE HUANG and XIAOHONG TANG

APPLICANTS

A N D :

PERRY DUMONCEAUX

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. The applicants, Zhongjie Huang and Xiaohong Tang, purchased a house from the respondent, Perry Dumonceaux. The applicants say that when they moved in, they discovered a dining room mirror and garage door opener were missing, the dryer and gas stove did not work, and that the walls, hot tub, and gas line were damaged. The applicants claim a total of $5,000 in repair and replacement costs.

2. Mr. Dumonceaux acknowledges responsibility for a stove burner ignitor that does not work, but otherwise denies the applicants' claims. He says that, as of the possession date, the house was in substantially the same condition as when it was viewed and that the appliances were in working order, other than the stove ignitor. Essentially, Mr. Dumonceaux says he fulfilled his responsibilities under the parties' agreement.

3. The applicants are represented by Mr. Huang. Mr. Dumonceaux is represented by Ms. Cori McGuire, a lawyer.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

6. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

PRELIMINARY ISSUES

8. The applicants initially named Mr. Dumonceaux's real estate agent, Tyler Dumonceaux as a respondent in this dispute. As he has the same last name as the respondent, I will refer to the agent by his first name, meaning no disrespect. The applicants withdrew their claim against Tyler before adjudication so I have amended the style of cause above.

9. The applicants submitted 28 pieces of evidence after the deadline to do so had passed. The CRT provided Mr. Dumonceaux with the late evidence, and he did not object to it. I find Mr. Dumonceaux was not prejudiced by the late evidence, as his representative had the opportunity to address it in her submissions. So, I have accepted and considered the late evidence.

ISSUES

10. The issues in this dispute are:

    a. Should Mr. Dumonceaux have left the dining room mirror or provided a garage door opener and, if so, what is the appropriate remedy?

    b. Is Mr. Dumonceaux liable for repair or replacement costs for the dryer or gas stove and, if so, what is the appropriate remedy?

    c. Is Mr. Dumonceaux responsible for the cost of repairing the walls, blinds, hot tub, and an alleged gas leak and, if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. I have read all the parties' submissions and weighed the evidence, but only refer to that necessary to explain my decision.

Background

12. The applicants purchased the home from Mr. Dumonceaux on September 17, 2020 and took possession on February 26, 2021. The applicants' agent viewed the home and took photos on September 16, 2020. The applicants had a home inspection done before the sale completed. None of this is disputed.

13. The principle of "buyer beware" generally applies to home sales. A buyer is required to make reasonable pre-purchase enquiries about the property. Exceptions include negligent or fraudulent misrepresentations and the seller's duty to disclose known latent defects (see *Nixon v. MacIver*, 2016 BCCA 8).

14. A latent defect is one that a buyer cannot discover through reasonable inspection and includes defects which make the property unfit or dangerous for living. Patent defects can be discovered through inquiry or reasonable inspection. A seller does not have to disclose patent defects to a buyer but cannot actively conceal them (see *Cardwell v. Perthen*, 2007 BCCA 313).

15. The parties' property sales agreement says that the property, and all included items, would be in substantially the same condition on possession (February 26, 2021) as when viewed by the applicants' agent (September 16, 2020). The agreement also says the included appliances will be in proper working order on possession.

Missing Items – Dining room Mirror and Garage Door Opener

16. It is undisputed that Mr. Dumonceaux took a large mirror off the dining room wall when he left. The applicants say the mirror was included in the parties' contract of purchase and sale, which Mr. Dumonceaux denies.

17. The parties' contract does not specifically refer to the dining room mirror but says the purchase price includes "fixed mirrors". Based on photos from both parties, I find the mirror had a wire on the back which hung from hooks embedded in the dining room wall.

18. I find Mr. Dumonceaux's mirror was not "fixed" to the wall because it was hung on hooks and easily removed (see *Royal Bank of Canada v. Maple Ridge Farmers Market Ltd.,* 1995 CanLII 896 (BC SC) and *Manarin v. Stelmaschuk Doucette Realty Ltd. and Leckie,* 2010 BCPC 81). So, I find the dining room mirror was not included in the agreement and dismiss the applicants' $750 claim.

19. Based on the garage door opener manual submitted by Mr. Dumonceaux, I find the garage door system, which is undisputedly affixed to the house, operates through a cell phone application. It is undisputed that Mr. Dumonceaux purchased 2 back-up garage door openers separately from the system, and that he has provided those to the applicants.

20. The parties' agreement does not mention garage door openers. Contrary to the applicants' argument, I find they are not entitled to 3 openers because the garage has 3 doors. I dismiss their $150 garage door opener claim.

Appliance Repair or Replacement Costs – Dryer and Stove

21. It is undisputed that the stove and dryer were included in the sales agreement.

22. Mr. Dumonceaux admits the ignitor for one of the gas stove burners was likely not working on the possession date. As Mr. Dumonceaux agrees to pay $150 for the burner, I allow the applicants' $150 claim for it.

23. The applicants say the dryer vibrates excessively and is very loud, which Mr. Dumonceaux does not dispute. However, he says the dryer dries laundry and is in the same condition as it was on September 16, 2020.

24. Despite the applicants' video recording of the sounds the dryer makes, I find there is nothing obviously wrong with the dryer. There is no expert opinion to explain whether the sound indicates something is wrong or that the dryer needs repair or replacement. There is also no indication that the dryer does not dry laundry. So, I find the applicants have not proven the dryer is not in proper working order. Further, they have not proven their alleged damages because they provided no evidence showing any repair or replacement costs. I dismiss the $250 dryer claim.

Repair or Replacement Costs – Walls and Blinds

25. Based on the applicants' photos, I find the paint halfway up a living room or hall wall is chipped. However, I find the chipped paint is in substantially the same condition as when viewed, as it is evident in both the applicants' viewing photo and post-possession photo.

26. I find the applicant's post-possession photos show scratches in the dining room wall paint where the lower right corner of the dining room mirror used to be. The scratches are not visible in the viewing photo. Mr. Dumonceaux says he did not know the scratches were behind the mirror and were likely caused by the mirror rubbing against the wall, which the applicants do not dispute. So, I find the scratches likely existed at the time of the viewing but not in open view with the mirror in place.

27. However, I find the scratches could easily have been seen had the applicants' agent looked behind the hung mirror, and so find the scratches are likely a patent defect. I also find that Mr. Dumonceaux did not actively conceal the scratches, based on his undisputed statement that he did not know about them. So, I find Mr. Dumonceaux is not responsible for dining room or hall painting costs. In any event, the applicants provided no quote or invoice for painting costs so did not prove their claimed damages. I dismiss their $750 wall damage claim.

28. The applicants say the wooden horizontal blinds do not open and close properly due to broken or missing strings. Contrary to the applicants' argument, the parties' agreement does not require the blinds were to be in proper working order. Rather, the blinds must be in substantially the same condition on possession as when viewed.

29. Mr. Dumonceaux says the blinds are original to the 1998 house, and the strings had knots in them to hold the blinds' position when viewed, the same as on possession. The applicants do not dispute this. Their photos show only that the blinds were open on viewing, but no do not show the condition of the blinds' strings. On balance, I find the applicants have failed to prove the blinds are not in substantially the same condition as when viewed. So, I dismiss the applicants' $150 blinds claim.

Repair Costs – Hot Tub and Gas Leak

30. The parties' agreement does not contain a specific warranty for the hot tub that was undisputedly included in the purchase price. So, I find Mr. Dumonceaux was required to leave the hot tub in substantially the same condition as when it was viewed and not in proper working order as the applicants argue.

31. The applicants say the hot tub leaked significantly for "months", that the leaks resulted from improper winterization and prior poor repairs, and that Mr. Dumonceaux knew the tub was leaking before he listed the house for sale. They also say 1 of the 4 hot tub pumps was not working, which is confirmed in the March 10, 2021 pool company service invoice. The invoice says that the issues, including the broken pump, are not recent and had accumulated over time. However, the invoice does not include any name or qualifications of the service provider. So, the invoice does not qualify as expert evidence under the CRT rules and I give it little weight. In any event, such a statement supports that the broken pump and leak existed at the time of the viewing.

32. Mr. Dumonceaux denies being aware of any hot tub pump issues but admits he was aware of a significant but obvious leak. Mr. Dumonceaux does not dispute the applicants' argument that he knew of the leak at the time of listing the property and says the applicants purchased the hot tub "as is" which implies the leak was there to

be found in September 2020. So, I find it likely that Mr. Dumonceaux knew of the leak by September 2020.

33. I infer the applicants argue that Mr. Dumonceaux should have disclosed the leak. I find it is not a latent defect but a patent defect, as it could easily have been found on inspection. As noted, there is no obligation to disclose patent defects.

34. The applicants also say Mr. Dumonceaux misrepresented the house as "meticulously maintained" and by failing to disclose the hot tub leak in the September 17, 2020 Property Disclosure Statement (PDS). There, Mr. Dumonceaux indicated he was not aware of any hot tub. A seller is required to honestly disclose their actual and current knowledge of the property in completing a PDS (see *Hamilton v. Callaway,* 2016 BCCA 189). Ms. McGuire says Mr. Dumonceaux believed all the former leaks had been resolved and relies on invoices and text messages from August 2019. She also says the 2020 leak was "normal" for a hot tub this size, without any explanation or supporting evidence. On balance, I find Mr. Dumonceaux said that there were no hot tub problems on the PDS when he likely knew of the "slight but obvious" leak.

35. In *Ban v. Keleher*, 2017 BCSC 1132, the court said that in order to prove fraudulent misrepresentation in the purchase and sale of a residential property, the applicant must show that:

    a. The respondent made a representation of fact to the applicant,

    b. The representation was false,

    c. The respondent knew that the representation was false when it was made, or made the false representation recklessly,

    d. The respondent intended for the applicant to act on the representation, and

    e. The applicant was induced to enter into the contract in reliance upon the false representation and suffered a detriment.

36. To prove negligent misrepresentation, the applicant must establish 5 elements (see: *Hanslo v. Barry*, 2011 BCSC 1624):

    a. There must be a duty of care,

    b. The representation in question must be untrue, inaccurate, or misleading,

    c. The respondent must have acted negligently in making the misrepresentation,

    d. The applicant must have reasonably relied on the negligent misrepresentation, and

    e. The reliance must have resulted in damages.

37. In real estate transactions the law presumes a special relationship between buyer and seller, and the seller owes the buyer a duty of care (see *Hanslo)*. The applicable standard of care is that of the reasonable person (see *McCluskie v. Reynolds (1998)*, 1998 CanLII 5384 (BC SC)).

38. While I find Mr. Dumonceaux's representation on the PDS was at least reckless, I find that the applicants have not established either fraudulent or negligent misrepresentation. This is because they have not shown they relied on the hot tub representation in deciding to buy the property or pay the agreed upon purchase price.

39. So, I find the applicants have not proven that Mr. Dumonceaux's PDS answer about the hot tub was fraudulent or negligent misrepresentation and further find that Mr. Dumonceaux had no obligation to repair the leak he knew of, or the pump failure he was not aware of. I also find the applicants have failed to prove that the hot tub was not in the same condition it was when viewed and inspected in September 2020. So, I dismiss their $2,499 hot tub claim.

40. The applicants also claim the exterior gas line was leaking at the time of possession, between the meter and the house, and that both Mr. Huang and M smelled the gas leak. As the applicants do not suggest the gas leak was a latent defect, or that Mr. Dumonceaux misrepresented the gas line's condition, I infer they argue the gas leak

arose between the September viewing date and the February possession date. Mr. Dumonceaux, who says he is a retired gas fitter, denies any leak and says neither he, nor Tyler smelled gas on February 25, 2021 when they were near the gas meter. Given his prior profession, I find Mr. Dumonceaux would be familiar with the smell of leaking gas.

41. In an October 13, 2021 statement, Tyler says he parked his car near the gas meter and stood there, speaking to Mr. Dumonceaux on February 25, 2021 but did not smell gas. Although Tyler has the same last name as Mr. Dumonceaux, there is no indication that he has any interest in the outcome of this dispute. So, I find any relationship between the 2 does not affect the weight of Tyler's statement, as argued by the applicants.

42. In any event, if the gas leak arose after Mr. Dumonceaux moved out, but by the noon February 26, 2021 possession date, it would still be Mr. Dumonceaux's responsibility to fix, under the agreement.

43. The applicants' agent confirmed she smelled gas when she was hiding the keys near the meter on February 26, 2021. The email's date is in another language but, based on its wording, I find the agent wrote the email after the fact, for this dispute. I find her later recollection about the gas smell is inconsistent with her emails and texts with Mr. Huang closer to the time, which do not support that the agent smelled gas on February 26, 2021.

44. The evidence shows Mr. Huang and his agent communicated frequently about a long list of house issues in the days following Mr. Huang's arrival but the gas leak is not mentioned until March 4, 2021. I find it likely that, if the agent smelled gas on February 26, 2021, she would have mentioned it earlier t.

45. I also give little weight to Mr. Huang's statement that he smelled gas at the meter while retrieving the keys on February 27, 2021. As noted, I find it likely he would have mentioned it to his agent before his March 4, 2021 text to her. Further, Mr. Huang recalls that Fortis BC turned off the gas when they found the leak, which I find could

not have happened. Based on the applicants' invoices, I find the leak was not fixed until March 12, 2021 yet a service technician serviced the gas appliances and taught the applicants how to use them on March 8, 2021 which I find would have required the gas to be on. So, I give little weight to Mr. Huang's later recollection of details surrounding the gas leak.

46. I find Mr. Dumonceaux's submitted report by Jim Klassen, retired gas fitter, is unhelpful in this dispute. Mr. Klassen was not present at the house at the time period in question to determine whether there was, or was not, a gas leak. Although Mr. Klassen says the pipe could leak if anyone modified the pipe or leaned things on it, the applicants' photos show no items near the meter on March 4, 2021.

47. On balance, I find it just as likely that the gas leak occurred after February 26, 2021 as it did on or just before that date. As noted above, the burden is on the applicants to prove it is more likely than not that the gas leak existed before noon on February 26, 2021, and I find they have not done so.

48. Even if they had proved a gas leak, I only would have allowed their claim for the cost of fixing the leak which, based on the March 12, 2021 invoice, is less than the $400 claimed. I dismiss the applicant's gas leak claim.

49. Finally, the applicants claim $1 for the indirect costs of fixing all the issues mentioned. I dismiss this claim as I have dealt with the identified issues under each claim heading, as explained above.

50. In summary, I allow the applicants' claim for $150 for replacing the gas stove burner ignitor. I dismiss the applicants' remaining claims.

CRT Fees, Expenses and Interest

51. The *Court Order Interest Act* applies to the CRT. The applicants are entitled to pre-judgment interest on $150 from the February 26, 2021 possession date to the date of this decision. This equals $0.62.

52. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I find the applicants were substantially unsuccessful in their claims. Based on Tyler's statement and text messages in evidence, I find Tyler told the applicants' agent that Mr. Dumonceaux would pay the stove repair costs. There is no contrary evidence. Overall, I find the applicants are not entitled to reimbursement of their CRT fees. As Mr. Dumonceaux was largely successful in defending these claims, I find he is entitled to reimbursement of his $50 CRT fees paid. Neither party claimed dispute-related expenses.

ORDERS

53. Within 14 days of the date of this order, I order Mr. Dumonceaux to pay Mr. Huang and Ms. Tang, a total of $100.62, broken down as follows:

    a. $150 in damages for the broken ignitor, and

    b. $0.62 in pre-judgment interest under the *Court Order Interest Act,* less

    c. $50 for Mr. Dumonceaux's CRT fees.

54. The applicants are entitled to post-judgment interest, as applicable.

55. I dismiss the remainder of the applicants' claims.

56. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision.

57. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Sherelle Goodwin, Tribunal Member